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COUNTERSTATEMENT OF THE CASE.

In January 1969 a pressman applied for a position directly to the employment office of Bulletin Company (hereinafter referred to as the "Bulletin") the publisher of The Evening and Sunday Bulletin. It is the usual practice in the newspaper industry for a journeyman pressman looking for a position with a newspaper to apply through the local pressmen's union or go directly to the pressroom of the newspaper for which he is interested in working. Thus, it is rare for a pressman to apply directly at the employment office of a newspaper.

The application made by the pressman in January 1969 was the first time since June of 1966 that a pressman had applied directly to the Bulletin employment office.

When another pressman had applied directly to the Bulletin employment office in June 1966 there was a disastrous slowdown in the Bulletin pressroom resulting in the inability to deliver tens of thousands of papers that day. The then business manager of petitioner, Philadelphia Newspaper Printing Pressmen's Union Local No. 16 (hereinafter referred to as "Local 16" or "Union") made it clear that Local 16 opposed the Bulletin's right to hire directly journeymen pressmen who are not members of Local 16 and who have not completed the newspaper pressmen's apprenticeship course. This dispute resulted in Local 16 being placed under trusteeship by the International Union. During the trusteeship an agreement was reached whereby Local 16 would not oppose the hiring of pressmen who were not members of Local 16 and who had not completed the apprenticeship program.

In light of this background and in the interest of maintaining good union-management relations, the Bulletin contacted the business manager of Local 16 in January of 1969 to inform him of the Bulletin's intention to hire this press-

man-applicant. Local 16 took the position that there would be trouble if this applicant, and the other seven applicants who subsequently applied directly to the Bulletin, were hired.

On February 17, 1969, one of the applicants filed unfair labor practice charges with the National Labor Relations Board (hereinafter referred to as the "NLRB") against the Bulletin and Local 16. Upon the request of the NLRB's Regional Director, the Bulletin entered into a settlement agreement together with Local 16 wherein it was agreed that the Bulletin would hire the charging party and the seven other applicants.

When the Bulletin posted the NLRB settlement agreement notice a few days prior to the date on which these pressmen were scheduled for work, a slowdown began in the pressroom. The slowdown continued the following day and by mid-afternoon it became apparent that it would be impossible to deliver approximately 200,000 of that afternoon's newspapers. Failing to obtain the cooperation of Local 16 to end the slowdown, and faced with the imminent threat of being unable to deliver the afternoon papers, the Bulletin removed the settlement notice whereupon production immediately began to return to normal. The Bulletin notified the Regional Office of the NLRB that to get normal production it was necessary to rescind the settlement agreement. The Bulletin then filed unfair labor practice charges against Local 16.

The Regional Director of the NLRB issued a consolidated complaint and shortly thereafter petitioned the United States District Court for the Eastern District of Pennsylvania for a preliminary injunction against the Bulletin and Local 16.

At the hearing held on the petition for the injunction an agreement was entered into, approved by the court, whereby the Bulletin agreed to offer employment to the

eight applicants and Local 16 agreed not to interfere with the hiring of these men or cause any stoppages or slowdowns.

From the time the first two men reported for work pursuant to the settlement agreement in late August 1969 the Bulletin was faced with slowdowns and numerous acts of sabotage in the pressroom and constant harassment directed towards these two men. After almost a week of this extensive sabotage and harassment the Bulletin found it necessary to send the men home in order to protect their health and safety as well as the health and safety of others working in the pressroom.

Thereafter, a hearing was held in the district court on the NLRB's petition for an injunction and the court ordered the immediate hiring of the eight men and restrained Local 16 from interferring with their employment. All eight of the men were then offered employment by the Bulletin and five of them accepted employment in November 1969.

A hearing on the NLRB consolidated complaint was held before an NLRB Trial Examiner who issued his decision finding that the Bulletin and Local 16 violated, respectively, Sections 8(a)(3) and (1) and 8(b)(2) and (1)(A) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151, et seq., (hereinafter referred to as the "Act")—the Bulletin by discriminating in regard to the hire and tenure of the eight applicants, Local 16 by causing the Bulletin to so discriminate, and both the Bulletin and Local 16 by maintaining in effect an agreement, understanding and practice which conditioned employment of pressmen with the Bulletin upon membership in, or clearance or approval by, Local 16.

The Trial Examiner recommended that the Bulletin and Local 16 cease and desist from the unfair labor practices, that the Bulletin offer to the eight applicants immediate employment as journeymen pressmen, that Local 16

notify the Bulletin in writing that it withdraws all objections to the employment of these eight applicants, that the Bulletin and Local 16 jointly and severally make the applicants whole for any loss of pay they may have suffered by reason of the discrimination against them, and that the Bulletin and Local 16 post designated notices.

Thereafter, both the Bulletin and Local 16 filed exceptions to the Trial Examiner's decision. The Bulletin took exception only to a portion of the remedy recommended by the Trial Examiner, it being the position of the Bulletin that it should only be secondarily, rather than jointly, liable with Local 16 for any backpay due the applicants.

The NLRB affirmed the Trial Examiner's rulings and adopted the Trial Examiner's findings, conclusions and recommendations with the modifications that the Bulletin be held only secondarily liable with Local 16 with respect to any backpay due the applicants.

The matter came before the United States Court of Appeals for the Third Circuit on application of the NLRB to enforce their order pursuant to Section 10(e) of the Act and on cross petition of Local 16 under Section 10(f) of the Act to review and set the order aside. In that appeal the Bulletin sought only to have the court require that the notices provided in the NLRB's order be posted simultaneously by Local 16 and the Bulletin, in order to forestall any recurrence of the acts of slowdown, sabotage and harassment which occurred when it previously attempted to comply with the terms of the settlement agreement. The court granted enforcement of the NLRB's order with the modification sought by the Bulletin: that the NLRB shall direct Local 16 and then Bulletin to post their respective notices simultaneously.

Local 16's petition for rehearing in the Third Circuit was denied by the court on July 27, 1971.

REPLY TO REASONS ADVANCED BY PETITIONER FOR GRANTING THE WRIT.

A. The Court of Appeals for the Third Circuit Did Review the Board's Determination of the Union's Motivation for Its Actions Which Were Found to Be Violations of the National Labor Relations Act.

The National Labor Relations Board found that the Bulletin and the Union violated Sections 8(a)(1) and (3) and Sections 8(b)(1) and (2) respectively of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151, by discriminating in regard to hire and tenure of eight persons, not members of Local 16 who applied for employment directly to the Bulletin, and by maintaining, enforcing and giving effect to an agreement which conditioned employment of pressmen with the Bulletin upon membership in, or clearance or approval by, Local 16 (18 N.L.R.B. No. 95).

The Court of Appeals for the Third Circuit, after carefully examining the entire record held that "we are fully convinced that the findings of fact of the Trial Examiner, as well as the conclusions of law, are amply supported by the evidence." (443 F. 2d 863, 865 (1971))

The Trial Examiner, in his decision which was adopted by the Board with only slight modification, considered at length the justifications advanced by Local 16 for its conduct and concluded that it was Local 16's aim to maintain a closed-shop condition by discriminating against applicants on the basis of union consideration. (TXD-638-39 at 18-21) Clearly such activity violates Sections 8(b)(1) and (2) of the Act. *Radio Officers' Union v. NLRB*, 347 U. S. 17 (1954).

In support of its petition for a writ of certiorari Local 16 relies extensively upon the second circuit decision in

NLRB v. Miranda Fuel Co., 326 F. 2d 172 (2d Cir. 1963). However, reliance on that case is totally misplaced. The second circuit was concerned in *Miranda* with discrimination for reasons wholly unrelated to "union membership, loyalty, the acknowledgment of union authority, or the performance of union obligations." (326 F. 2d at 175) It is clear in the instant case that the intent and purpose of Local 16 in forcing the Bulletin not to hire the eight applicants was to encourage membership in Local 16. *See Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers v. NLRB*, 365 U. S. 667 (1961).

B. The Decision of the Board as Enforced by the Third Circuit Court of Appeals Found Clearly That the Union's Activities Were Unfair Labor Practices Rather Than Proper Union Functions.

Contrary to the allegations of the petitioner, the Court of Appeals for the Third Circuit, in enforcing the Board's order as modified, did not take the position that any union or employer practice which encourages union activity and membership is a per se violation of the Act; the Board and the court simply held that Local 16's activities in forcing the Bulletin to refuse to hire the applicants because they lacked membership in and were not initially approved or cleared by Local 16 violated the National Labor Relations Act. Furthermore, the Board, in adopting the Trial Examiner's decision, considered at length Local 16's alleged justifications for its actions and totally rejected the assertions that they constituted legitimate or legal justifications.

The suggestions by Local 16 in its petition for writ of certiorari that the Bulletin failed to live up to its obligations in policing its place of work and its work force or that the Bulletin made no effort to control its own plant and work force are not only unsupported by, but are directly contrary to the evidence. While both the National Labor

Relations Board and the Court of Appeals for the Third Circuit adopted almost all of the Trial Examiner's decision without comment, both the Board and the Court of Appeals apparently felt compelled to recite at length the activities of Local 16 and its members with respect to the incidents of sabotage, slowdowns and harassment which occurred when the Bulletin attempted to hire the applicants. It was because of these activities on the part of Local 16 and the extended effort by the Bulletin to overcome Local 16's adamant and violent opposition to the hiring of the eight applicants, that the Board, with the approval of the Court of Appeals, held that Local 16 should be primarily liable for any backpay due the applicants.

The Board stated in its decision and order:

> "The facts show that the Company made repeated attempts to persuade the Union that the ex-Curtis pressmen were qualified and that a negotiated solution was the preferable one. The Union responded with assertions of its 'exclusive' control over hiring, warnings of 'trouble,' and the statement that the eight applicants would be hired only under a court order. Following a crippling slowdown in the pressroom (which upset a Board settlement agrement), the Company itself filed charges against the Union. And the Union persisted in its unlawful pressures against the hiring of the ex-Curtis employees. In light of the Union's intransigent attitude and the Company's vulnerability to union pressure, we cannot say, for remedy purposes herein, that the Company should be faulted for not having done more than it did to resist the Union's coercive and discriminatory conduct. Rather, we are satisfied that, under the circumstances presented, the Company took all reasonable measures required to overcome the Union's opposition to the hiring of the eight applicants,

and that the primary burden for restoring the wage losses resulting from the discrimination rightfully falls upon the Union." (181 N.L.R.B. No. 95 at 2-3) (footnote omitted)

In finding that the Board's order holding Local 16 primarily liable for the backpay to be "just and warranted" the Court of Appeals pointed out that it would be "patently inequitable that the employer be more than secondarily responsible for back pay." (443 F. 2d at 865). See also *NLRB v. Lexington Electric Products Co.*, 283 F. 2d 54 (3d Cir. 1960), *cert. denied*, 365 U. S. 845 (1961).

The evidence is strong, clear and convincing, as found by the Trial Examiner, the Board and the Court of Appeals, that the purpose, intent and effect of Local 16's actions was to illegally condition employment at the Bulletin upon membership in or clearance or approval by Local 16.

CONCLUSION.

For the foregoing reasons the petition for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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